

Rule 8, Ariz. R. Crim. Proc.

Motion to Continue so Assigned Prosecutor Can Present the Case

No “fungible prosecutors.” When the assigned prosecutor is in trial in another case, the Court should grant the State a continuance so that the assigned attorney can present the State’s case.

The State asks this Court to continue the trial in this matter now set for [date] to [date]. The assigned prosecutor, [Assigned Prosecutor’s Name], is currently in trial on another case, and the State asks for this continuance so that the assigned prosecutor can present the State’s case. The following Memorandum supports this Motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Factual and Procedural Background

[Set out facts of your defendant’s case, including when trial is set and when the “last day” is. Also include any information about continuances requested and received by the defense.] The assigned prosecutor, [Assigned Prosecutor’s Name], was assigned the case on [date]. [Assigned Prosecutor’s Name] is currently in trial in Judge [Judge’s Name]’s court in the case of [Other Defendant’s Name], [cause number]. [Assigned Prosecutor’s Name] believes that [Other Defendant’s Name]’s trial will be completed by [date].

II. Law and Argument

This Court has discretion to grant a continuance because the assigned prosecutor is in trial in another court.

The trial court has discretion to grant a motion to continue “on the motion of a party.” Rule 8.5(a), Ariz. R. Crim. Proc. Thus, either party – the defense or the State – may seek a continuance under that Rule.

Rule 8.5(b) states that the court may grant a continuance only on a showing that extraordinary circumstances exist and that delay is necessary for the interests of justice.

That subsection provides:

A continuance of any trial date shall be granted only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice. A continuance may be granted only for so long as is necessary to serve the interests of justice. In ruling on a motion for continuance, the court shall consider the rights of the defendant and any victim to a speedy disposition of the case. If a continuance is granted, the court shall state the specific reasons for the continuance on the record.

In the context of a judge's illness, the Arizona Court of Appeals has noted that the absence of "key court personnel" is an extraordinary circumstance for purposes of Rule 8.5. *State v. Henry*, 191 Ariz. 283, 285, 955 P.2d 39, 41 (App. 1997).

In considering whether the State's motion to continue is "necessary to serve the interests of justice" under Rule 8.5(b), this Court should keep in mind that the prosecution's interests in the case "include serving the interests of justice." *Trebus v. Davis*, 189 Ariz. 621, 624, 944 P.2d 1235, 1238 (1997). Under A.R.S. § 11-532, the county attorney is the public prosecutor of the county and shall "conduct, on behalf of the state, all prosecutions for public offenses." The prosecutor has a duty to the public to prosecute criminal cases effectively so that justice is done. "Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime. To this extent, our so-called adversary system is not adversary at all; nor should it be." *U.S. v. Wade*, 388 U.S. 218, 256-57 (1967) [White, J., concurring and dissenting], *quoted in State ex rel. Romley v. Superior Court*, 181 Ariz. 378, 382, 891 P.2d 246, 250 (App. 1995). The Comment to Ethical Rule 3.8 states, "A prosecutor has the responsibility of a minister of

justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.” Rule 42, Rules of the Supreme Court, Rules of Professional Conduct, ER 3.8. Thus, the prosecutor has a duty to present the State’s case effectively, as well as a duty to protect the defendant’s rights, so that justice is done. Effective prosecution in this case requires that the assigned prosecutor remain on the case because [explain]. Under the circumstances of this case, it is not possible for a substitute prosecutor to step into the shoes of the assigned prosecutor and effectively conduct the prosecution.

In *State v. Mendoza*, 170 Ariz. 184, 823 P.2d 51 (1992), when the assigned prosecutor was trying another case, the Arizona Supreme Court held that the trial court properly granted the State a 28-day continuance and excluded that time. The Court found that the trial court did not violate the defendant’s right to a speedy trial under Rule 8 by granting the continuance that the State “needed because the prosecutor was trying another case.” *Id.* at 193, 823 P.2d at 60. The Court explained:

The trial court’s exercise of discretion on a motion for continuance under this rule is not disturbed unless there is a clear abuse of discretion and prejudice results. This “clear abuse of discretion” standard applies because the trial court is the only unbiased party in a position to observe the proceeding ... [and] is the only party to judge the inconvenience of a continuance to the litigants, counsel, witnesses, and the court ... and [to] determine whether there are “extraordinary circumstances” warranting a continuance and whether “delay is indispensable to the interests of justice.”

Id., quoting *State v. Hein*, 138 Ariz. 360, 368, 674 P.2d 1358, 1366 (1983) [citations and internal quotation marks omitted]. The Court reasoned in *Mendoza* that the defendant had not identified any prejudice caused by the continuance, noting that the defense had sought and received two continuances *after* the continuance granted to the State.

However, the Court cautioned that a prosecutor's scheduling conflict would not *always* be "an extraordinary circumstance meriting an excludable delay under rule 8.5(b);" instead, a determination whether the trial court abused its discretion would depend on the facts of the individual case. *Id.*

The facts of the present case show that the assigned prosecutor's unavailability is an extraordinary circumstance that merits an excludable delay under Rule 8.5(b). The interests of justice in this case require a continuance so that the State can present its case effectively. [Explain why: some relevant factors would include the complex nature of this case, the assigned prosecutor's special qualifications, his/her rapport with victims, etc.]

Contrast the facts of this case with those in *State v. Heise*, 117 Ariz. 524, 573 P.2d 924, in which the Arizona Court of Appeals held that the trial court abused its discretion in granting the State a continuance. In *Heise*, although an essential State's witness informed the prosecutor before trial that the witness would be on vacation and unavailable on the trial date, the prosecutor did not bring the matter to the trial court's attention until the day of trial. On that date, the prosecutor orally requested a continuance, explaining only that the witness was not available, and the trial court granted a continuance. The Court of Appeals stated that, when the sole reason for the continuance was the prosecutor's failure to keep track of the State's own trial schedule and its witnesses, the Court "must reluctantly conclude that the trial court abused its discretion in finding the existence of extraordinary circumstances."

Nor is this case like *State v. Strickland*, 27 Ariz. App. 695, 558 P.2d 723 (App. 1976). In *Strickland*, on the morning the trial was to begin, the prosecutor moved to

continue the trial on the grounds that two police officer witnesses were unavailable to testify because they were on vacation. The Court of Appeals found that the trial court erred in granting the continuance, stating, “[T]he State must show better reasons than a bare allegation of a ‘vacation conflict’ in order to justify a continuance,” especially because the State did not seek the continuance until the morning of trial. *Id.* at 696-97, 558 P.2d at 724-25. However, the Court found in *Strickland* that the error in granting the continuance did not require reversal. Thus, *Heise* and *Strickland* were cases in which the prosecution knew in advance that a witness would not be available, but waited until the day of trial to seek a continuance.

By contrast, the case here does not involve an unavailable witness, but an unavailable prosecutor. While no Arizona case directly addresses the propriety of granting a continuance so that the assigned prosecutor can try a case, courts in other jurisdictions have held that such continuances are proper. In *State v. Palmer*, 684 P.2d 787 (Wash. App. 1984), the assigned prosecutor in Palmer’s case was in trial on a negligent homicide case when Palmer’s case came up for trial. The assigned prosecutor’s supervisor requested and received two five-day extensions over the defendant’s objections. The trial began at the end of the second extension and the jury convicted Palmer. On appeal, Palmer argued that the trial court erred in granting the State’s motions for extensions of time, contending that “the prosecutor’s involvement in another trial [was] not an ‘unavoidable or unforeseen’ circumstance” under Washington law. *Id.* at 788. The Washington Court of Appeals found no abuse of discretion by the trial court’s granting the extensions. That Court explained:

The trial deputy’s scheduling difficulties were the result of delay in assignment out of the presiding department and the particular

complications of her negligent homicide trial. These problems were specific, unpredictable, and certainly not self-created. Accordingly, the delay was the result of unforeseen and unavoidable circumstances beyond the control of the court or parties, and, as such, was a proper reason to grant an extension pursuant to [Washington's Rules of Criminal Procedure].

Id. at 788-89.

Similarly, in *State v. Stock*, 722 P.2d 1330 (Wash. App. 1986), the State moved for a five-day continuance, explaining that the assigned prosecutor was still in trial in another case that had been expected to take no more than three days. Citing *Palmer, supra*, the Washington Court of Appeals noted that in similar circumstances, “the courts have found that a specific unforeseen difficulty in the prosecuting attorney’s trial schedule is sufficient cause to grant a 5-day extension.” *Id.* at 1333. See also *State v. Kelley*, 828 P.2d 1106, 1111 (Wash. App. 1992), finding no error in granting the State’s motions to continue and noting, “Deputy prosecutors, particularly those in our heavily populated counties, are required to try cases back to back, day after day, and month after month, and year after year.”

Maryland also has recognized that a prosecutor’s unavailability was proper grounds for a continuance in the interests of justice. In *State v. Toney*, 553 A.2d 696 (Md. App. 1989), the assigned prosecutor was unavailable for Toney’s trial because that prosecutor was still trying “a series of murder trials which had lasted well beyond any reasonable estimate.” *Id.* at 702-03. The Maryland Court of Appeals found no abuse of discretion in the trial court’s granting the State’s motion to continue. The Court reasoned that the Maryland criminal law and rules allowing continuances for “good cause” were intended, not only to benefit defendants and courts, but also “to help relieve the pressures placed upon prosecutors.” *Id.* at 702. The prosecutor argued in the trial court

that the State's Attorney's interest in retaining a particular prosecutor on a difficult case arose "because prosecutors are not 'fungible' and are not readily able to trade off serious cases." The Maryland Court agreed and found no error, stating, "We think that the State's interest in maintaining prosecutorial continuity is a significant interest which in some instances may qualify as good cause for a postponement." *Id.* at 703.

In addition, California has found that a prosecutor's unavailability justified granting a continuance. In *People v. Luparello*, 187 Cal.App.3d 410, 430-431, 231 Cal.Rptr. 832, 843 (Cal. App. 1986), the prosecutor could not proceed because "he had become unexpectedly involved with another murder trial." The Court found no error, stating, "[The defendant] has not shown, nor does the record reveal, the prosecutor intentionally or negligently delayed the instant proceedings. As was determined at the trial court's hearing on this matter, the delay resulting from the prosecutor's conflicting commitments was unavoidably unforeseeable."

Compare *State v. Windish*, 590 N.W.2d 311 (Minnesota 1999), in which the defendant was charged with threatening his neighbor. After repeated delays caused by court congestion and a judge's illness, the case was reset before a new judge. The new judge set the case off for a specific date three weeks off and said there would be no further continuances. The assigned prosecutor noted a possible scheduling conflict for that date, but the judge said, "I think that's time enough for someone from your office to try the case." *Id.* at 314. Although the prosecutor stated she wanted the record to be clear that prosecutors in her office were not "fungible," the trial court said the trial would go on the appointed date, either with the assigned prosecutor or with another member of her office. Nevertheless, the assigned prosecutor made no attempt to appear on that

date, nor did she even try to get a substitute attorney. Instead, a different attorney from her office appeared solely to ask for a continuance, saying that the assigned prosecutor was in another trial. *Id.* The trial court continued the case over the defendant's objection. When the case finally went to trial three months later, it was before a new judge, with a different defense attorney and a different prosecutor. The prosecutor called just three witnesses and rested the State's case in less than a day. *Id.* at 315. Although the Minnesota Supreme Court found no constitutional violation, the Court reversed Windish's conviction, finding that the delay had not served the interests of justice. The Court noted that prosecutors are obligated to make a good faith effort to bring defendants to trial. *Smith v. Hooey*, 393 U.S. 374, 383 (1969). The Court concluded that, under all of the circumstances, both the court system and the prosecution had failed to fulfill their obligations to bring the defendant promptly to trial.

While we are not prepared to label the actions of the state in this case bad faith, we are concerned that the prosecution failed to try the case when ordered. Under these circumstances, and given the state's substitution of prosecutors in the end, we conclude that the state did not have good cause to delay the case.

Id. at 317.

In this case, unlike *Windish, supra*, [insert facts, as appropriate, showing that there is no delay by the State in bringing the defendant to trial (and) the case is a complex one that cannot easily be assigned to another attorney]. Therefore, this Court should grant the State's motion to continue the trial in this case so [Assigned Prosecutor's Name] can represent the State in this case.

III. Conclusion

For all the reasons stated in this Motion, the State asks this Court to grant the State's motion and continue the trial in this cause number to [date] so that the assigned prosecutor can present the State's case at trial.